No. 423

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Supreme Court of the United States

OCTOBER TERM, 1949.

INTERSTATE EQUIPMENT CORPORATION,
Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, to the use of Esther F. Silva, and Earl C. Silva, a minor,
Respondent.

INTERSTATE EQUIPMENT CORPORATION,
Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, to the use of George W. Johnson,
Respondent.

INTERSTATE EQUIPMENT CORPORATION,
Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, to the use of Henry K. Plemer,
Respondent.

INTERSTATE EQUIPMENT CORPORATION,
Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, to the use of Hiram John,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement	4
Reasons for Granting Writ	6
Argument:	
I In disposing of respondent's motion to amend, the District Court was bound to apply the law of New Jersey	7
II The action of the District Court is appealable and the Court of Appeals erred in dismissing the appeals under the final judgment rule	11
(1) The action of the District Court finally disposed of substantial rights of petitioner	12
(2) The action of the District Court determined a controversy distinct from the general subject matter of the litigation	14
Conclusion	18

CITATIONS.

PAGE

Cases.

American Brake Shoe & Foundry Co. v. *New York Rys. Co.*, 282 Fed. 523 (C. C. A. 2d, 1922) 13
American Well Works Co. v. *Layne & Boller Co.*, 241 U. S. 257 (1916) 8
Bankers Trust Co. v. *M. K. & T. Ry. Co.*, 251 Fed. 789 (C. C. A. 8th, 1918) 13
Cathay Trust, Ltd. v. *Brooks*, 193 Fed. 973 (C. C. A. 9th, 1912) 13
City & County of Denver v. *Stenger*, 295 Fed. 809 (C. C. A. 2d, 1924) 13
Cohen v. *Beneficial Industrial Loan Corp.*, U. S. , 93 L. ed. Adv. Op. 1221, 1226 (1949) 12, 14
Coventry v. *Barrington*, 117 N. J. L. 217, 187 Atl. 348 (E. & A., 1936) 7, 9
Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938) 8
Glinski v. *United States*, 93 F. 2d 418 (C. C. A. 7th, 1937) 16
Guaranty Trust Co. v. *York*, 326 U. S. 99 (1945) 8, 9, 15
Gully v. *First National Bank*, 299 U. S. 109 (1936) .. 8
Gumbel v. *Pitkin*, 113 U. S. 545 (1885) 13
Hawkins v. *Public Service Coordinated Transport*, 137 N. J. Eq. 183, 44 A. 2d 35 (Ch., 1945) 11
Hopkins v. *McClure*, 148 F. 2d 67 (C. C. A. 10th, 1945) 16
Jackson v. *Heiser*, 111 F. 2d 310 (C. C. A. 9th, 1940) 16
Kasishke v. *Baker*, 114 F. 2d 384 (C. C. A. 10th, 1944) 15
Maitland v. *Worthington*, 59 N. J. L. 114, 35 Atl. 759 (Sup. Ct., 1896) 7, 9

PAGE

Odell v. *Batterman*, 223 Fed. 292 (C. C. A. 2d, 1915) 13

Peters v. *Public Service Corp.*, 132 N. J. Eq. 500, 29 A. 2d 189 (Ch., 1942), aff'd 133 N. J. Eq. 283, 31 A. 2d 809 (E. & A., 1943) 10
Puerto Rico v. *Russell*, 288 U. S. 476, 483 (1933) 8

Ragan v. *Merchants Transfer & Warehouse Co.*, U. S. , 93 L. ed. Adv. Op. 1248 (1949) 9, 11
Republic Gas Co. v. *Oklahoma*, 334 U. S. 62 (1948) .. 13
Rubert Hermanos, Inc. v. *People of Puerto Rico*, 118 F. 2d 752, 757 (C. C. A. 1st, 1941) 12, 15

Sayres v. *Scudder*, 2 N. J. L. 53 (1806) 13
Shoshone Mining Co. v. *Rutter*, 177 U. S. 505 (1900) 8
Shulthis v. McDougal, 225 U. S. 561 (1912) 8
State Tax Commission v. *United States*, 136 F. 2d 903 (C. C. A. 10th, 1943) 16
Stevirmac Oil & Gas. Co. v. *Dittman*, 245 U. S. 210 (1917) 16

Taylor v. *United States*, 145 F. 2d 641 (C. C. A. 10th, 1944) 16
Ex parte Tiffany, 252 U. S. 32 (1920) 13
Timmons v. *Wigboldus*, 137 N. J. L. 733, 61 A. 2d 269 (E. & A., 1948) 10
Trustees v. *Greenough*, 105 U. S. 527 (1881) 15

U. S. v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2d, 1942) 12
United States v. *River Rouge Improvement Co.*, 269 U. S. 411 (1926) 14, 15

Statutes.

R. S. 2:24-2 ..... 3, 4

Title 28, U. S. C., § 1254 (1) 2
Title 28, U. S. C., § 1291 (1948) 12
Title 28, U. S. C., § 1652 3

PAGE

Longshoremen's & Harbor Workers Act, Title 33, U. S. C., § 901 8

Texts.

Crick, *Final Judgment as a Basis for Appeal* (1932) 41 Yale L. J. 539 12

Note (1947) 47 Col. L. Rev. 239, 252 12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Interstate Equipment Corporation, of New York, appealed to the court below to review directly two orders of the District Court for the District of New Jersey entered in these actions and also petitioned the court below to review those orders by the issuance of a common law writ, in the event that the court below found that the orders were not reviewable on direct appeal. Petitioner now respectfully prays that a writ of certiorari be issued in the above cases to review the judgment of the United States Court of Appeals for the Third Circuit entered July 29, 1949 dismissing the appeals taken to that court by petitioner. In a second petition, filed concurrently herewith, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered July 29, 1949 dismissing the Application to that court for the issuance of a common law writ to review the action of the District Court.

Opinions Below.

The opinion of the Court of Appeals is reported in 176 F. 2d 419. The first opinion of the District Court is reported in 74 F. Supp. 791. The second opinion of the District Court is reported in 81 F. Supp. 357.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 25, 1949. The jurisdiction of this court is invoked under Title 28, United States Code, § 1254 (1).

Statutes Involved.

Title 28, United States Code, § 1652, provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

Title 2, Chapter 24, Section 2 Revised Statutes of New Jersey, 1937 (R. S. 2:24-2, N. J. S. A. 2:24-2), provides:

> "All actions for injuries to the person caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state shall be commenced within two years next after cause of any such action shall have accrued, and not thereafter."

Questions Presented.

1. Should the District Court have applied the law of the State of New Jersey in disposing of the respondent's application to that court for leave to amend the process and complaints so as to substitute petitioner as the sole defendant in the actions, after the running of the statute of limitations?

2. Is the action of the District Court in refusing to apply local law, under the facts presented, appealable?

Statement.

This matter involves four common law actions commenced by respondent in the District Court against "Interstate Equipment Corporation, a corporation of the State of New Jersey" (herein referred to as "Interstate of New Jersey"), on subrogated claims arising out of an aerial tramway accident which occurred on April 8, 1942 on the island of Oahu, in the Territory of Hawaii. The first action (No. 2788 in the District Court) was commenced on March 12, 1943, and the other three actions (Nos. 3448-3450 in the District Court) were commenced on March 30, 1944. Under the New Jersey statute of limitations, prosecution of the claims upon which the actions were founded would have been outlawed on April 8, 1944, nine days after the last three complaints were filed. R. S. 2:24-2, N. J. S. A. 2:24-2.

The actions were expressly founded upon the diversity jurisdiction, and the complaints in all four actions were framed in the same terms and upon the same theory. They alleged negligence and the lack of reasonable care on the part of the defendant, with full knowledge of use, in the manufacture, installation, inspection and approval of an aerial tramway whose disruption gave rise to the accident. The complaints also averred a freedom from negligence on the part of the persons injured and set forth a statement of the facts, which resulted in the subrogation to the claims.

Process in the first action was served upon "G. M. Kilcarr, Vice President for said corporation," and process in the subsequent actions was served upon "Frank Lawrence, Secretary of said corporation." G. M. Kilcarr is not and never has been an officer of the named defendant, but is a vice president of petitioner. Frank Lawrence, at

the time of service, was acting as secretary of the named defendant and was its registered agent for accepting service of process.

Interstate of New Jersey was organized in 1928 under the laws of New Jersey, and petitioner was organized in 1915 under the laws of New York. The fact that the named defendant and petitioner remain separate entities has not been directly questioned in these proceedings.

Interstate of New Jersey had no connection with the tramway accident, and consequently its attorney filed an answer to the complaint in the first action denying that it manufactured, installed, inspected and approved the tramway and denying that it had failed to use reasonable care in the manufacture, installment, inspection and approval of such equipment. In order to meet the averment of the complaint that the injured party was "without negligence," the answer pleaded contributory negligence. This answer was filed on September 23, 1943, more than six months before the expiration of the period within which suit might be commenced under the New Jersey statute. Subsequently, the attorney for Interstate of New Jersey filed similar answers in the other three actions.

On February 20, 1947, three years and five months after the filing of the first answer by the New Jersey corporation, respondent served upon the named defendant a notice of motion to amend the summons and complaint in each of the four actions so as to make petitioner the sole party defendant. In an opinion filed December 10, 1947, Judge Fake held that the amendment sought should be granted. Thereupon, petitioner filed a special appearance in the actions and moved the court to vacate its opinion, to amend the findings and conclusions, and to enter an order denying respondent's motion to amend. On December 21, 1948, Judge Fake filed

a second opinion, reaffirming the holding of the prior one. Two orders entered on January 17, 1949 in conformity with the second opinion (the first order denying petitioner's motion and the second order granting respondent's motion) constitute the action concerning which petitioner sought review in the Court of Appeals. The *per curiam* opinion of the Circuit Court, filed July 29, 1949, dismissed the appeals under the final judgment rule.

In support of its motion in the District Court, petitioner argued that, under the facts presented, in determining whether to permit the amendments desired by respondent the court was bound to apply the law of New Jersey, that under local law the actions were barred by the statute of limitations, and, therefore, that a new party could not be substituted into the actions through the device of an amendment. The District Court refused to consider New Jersey law and based its opinion upon what it had previously termed the "ever present equity powers" of the court. 74 F. Supp. at 794. In the Court of Appeals, petitioner urged that the District Court was in error in failing to apply New Jersey law and that such failure constituted appealable action.

Reasons for Granting the Writ.

1. Under the facts presented, the District Court should have applied the law of New Jersey in disposing of respondent's motion to amend, since disregard of local law significantly affects the result of the litigation. The action of the District Court in disregarding the law of New Jersey is in conflict with applicable decisions of this court and is appealable action under decisions of this Court, since it disposes of substantial rights in a controversy distinct from the general subject of the litigation.

ARGUMENT.

I.

In disposing of respondent's motion to amend, the District Court was bound to apply the law of New Jersey.

Under settled New Jersey law, a party cannot be substituted into an action by the device of an amendment after the statute of limitations has run in his favor. *Coventry* v. *Barrington*, 117 N. J. L. 217, 187 Atl. 348 (E. & A., 1936), and *Maitland* v. *Worthington*, 59 N. J. L. 114, 35 Atl. 759 (Sup. Ct., 1896), are the leading cases. The holding of the New Jersey courts is summarized in the *Coventry* case in the following language (117 N. J. L. at 219):

> "To have allowed the amendment under the circumstances would be to recreate a cause of action which had existed but had expired by lapse of time fixed by the statute for instituting the suit. Such action would be a disregard of the statutory mandate.
>
> "The intended amendment was substantial, not formal. It proposed to bring in a new party which theretofore had not been made a party to the action. It would have affected substantial rights."(1)

(1) In the *Coventry* case, the defendant was designated in the process and pleadings as "Lightning Service Co., a corporation." Service of process was made upon "B. Nadelberg, Registered Agent." Actually, the intended defendant was not a corporation but a partnership consisting of Nadelberg and one Albert Richman. After the statute of limitations had run, plaintiff sought to amend the process and complaint by substituting for the designation "Lightning Service Co., a corporation" the names of the individuals Nadelberg and Richman, trading as Lightning Service Company, as defendants in the action. The trial judge refused to allow the amendment, and his action was affirmed by the highest court of the state.

Therefore, if the present actions had been pending under like circumstances in the local courts, rather than in the District Court by reason of a diversity of citizenship,(2) respondent's motion to amend would have been denied and petitioner accorded full rights of repose under the New Jersey statute.

This case thus falls within the policy of federal jurisdiction announced in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), and further defined in *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945). In refusing to consider the effect of local law in the disposition of respondent's motion to amend, the action of the District Court is in conflict with those decisions.

Guaranty Trust Co. v. *York* made it clear that the local law to be applied by the federal courts includes *all* of the law, without reference to distinctions between substance and procedure, so long as that law makes a substantial difference in the rights of the parties in a diversity action. There, as here, important questions relating to rights under a state statute of limitations were involved. There, however, it was held that critical analysis is necessary and

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(2) Diversity is alleged in the complaints. The actions are grounded in negligence and seek recovery upon common law principles. The Longshoremen's & Harbor Workers Act, *Title 33, United States Code, § 901,* which, it is alleged, vests a right of action in respondent, merely permits respondent to prove his title by subrogation to the claim averred against the alleged tort-feasor. The cited act covers liability between employer and employee, but creates no liability as such where a covered employee is injured by a third party. "The nature of the right to be established is decisive—not the source of the authority to establish it." *Puerto Rico* v. *Russell,* 288 U. S. 476, 483 (1933). Any contention that these actions present cases arising "under the constitution or laws of the United States" is contrary to a line of authority construing the original jurisdiction statute, of which the following decisions, in addition to the *Puerto Rico* case, are representative: *Gully* v. *First National Bank,* 299 U. S. 109 (1936); *American Well Works Co.* v. *Layne & Boller Co.,* 241 U. S. 257 (1916); *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505 (1900). See also, *Shulthis* v. *McDougal,* 225 U. S. 561 (1912).

where one is barred from recovery in a state court, he should likewise be barred in the federal court.(3) Here, the District Court wholly refused to consider the questions presented in their relation to the *Erie* doctrine and made no attempt to determine what the result would have been had those questions been presented for determination to a New Jersey court.(4)

In his second opinion, the District Court Judge made no reference to petitioner's argument concerning the applicability of local law, and summarily disposed of all questions relating to the statute of limitations as having "no direct bearing on the issues to be reconsidered." 81 F. Supp. at 358. All of the problems were determined on the basis of what had been termed in the first opinion as the court's "ever present equity powers." In effect, this is the same situation that was presented in *Guaranty Trust Co.* v. *York*. There, Judge Frank below had held that there was no requirement to apply the state statute of limitations in the presence of "strong countervailing equitable considerations." 143 F. 2d 503, 528. But this court reversed, and in so doing quoted with approval from the dissenting opinion of Judge Augustus N. Hand that "it would be a mischievous practice to disregard state statutes of limitations

(3) This holding recently was reaffirmed by this court in *Ragan* v. *Merchants Transfer & Warehouse Co.*, U. S. , 93 L. ed. Adv. Op. 1248 (1949), wherein it is said, at p. 1249: "If recovery could not be had in the state court, it should be denied in the federal court."

(4) For present purposes, the vital question, as is recognized in *Guaranty Trust Co.* v. *York*, is not whether the New Jersey statute, as applied by the New Jersey courts, actually would bar the actions against petitioner if they had been brought originally in the state courts, but whether the District Court is bound by local law under the circumstances of the case. The New Jersey cases of *Coventry* v. *Barrington* and *Maitland* v. *Worthington* not only indicate that a different result would have followed in the local courts but, also, that the questions presented are intimately related to the policy of the state statute and are considered by the New Jersey courts to be questions of substance.

whenever federal courts think that the result of adopting them may be inequitable". 326 U. S. at 111, quoting from 143 F. 2d at 531.

Nor can it be argued that, in developing the equitable considerations upon which its decision was based, the District Court paid respect to local law. Each of the factors relied upon in support of that court's conclusion have been considered by the New Jersey courts as insufficient to vary the operation of the statute of limitations. *Peters* v. *Public Service Corp.*, 132 N. J. Eq. 500, 29 A. 2d 189 (Ch., 1942), aff'd 133 N. J. Eq. 283, 31 A. 2d 809 (E. & A., 1943), disposes in petitioner's favor of questions relating to the effect of the answers filed by Interstate of New Jersey,(5) the close relationship of the two corporations,(6) and the obligation of the attorney for the New Jersey corporation to advise respondent, before the running of the statute of limitations, that the wrong defendant had been sued.(7) *Timmons* v. *Wigboldus*, 137 N. J. L. 733, 61 A. 2d 269 (E. & A., 1948), disposes in petitioner's favor of the question of the effect of the plea of contributor, negligence filed

(5) "• • • in the death case defendant company, by its answer, denied ownership and operation of the colliding bus, *in other words, by appropriate pleadings the defendant apprised plaintiffs that defendant's contention was that the wrong defendant had been sued.*" 132 N. J. Eq. at 509 (italics supplied).

(6) The named defendant, in the *Peters* case was "Public Service Coordinated Transport," the proper defendant was "Public Service Interstate Transportation Company." The close relationship of these two companies is described in the opinion, 132 N. J. Eq. at 509, but was held to be of no effect in the absence of an affirmative showing "that the corporate set-up was conceived in fraud or that the defendants in any way intentionally used this set-up to confuse complainants." 132 N. J. Eq. at 510. It is also to be noted that there one claim agent acted for both companies in the negotiations relating to the actions. 132 N. J. Eq. at 510.

(7) "There was no duty, under the circumstances, for O'Connor or anyone else to advise the plaintiffs that they had sued the wrong defendant, especially in view of the answer aforesaid." 132 N. J. Eq. at 508.

by the New Jersey corporation.(8) Both cases demonstrate that at all times the actions of the attorney for Interstate of New Jersey were consistent with New Jersey law and practice, and that there is no foundation for the conclusions that "such conduct is not praiseworthy." 81 F. Supp. at 359, and was designed to lull the respondent "into a position of false security."

In addition, the District Court made no attempt to balance those factors which it felt invoked equitable consideration against the lack of diligence shown by respondent, such as is required by the New Jersey courts before equitable relief may be invoked. See, *Hawkins* v. *Public Service Coordinated Transport*, 137 N. J. Eq. 183, 44 A. 2d 35 (Ch., 1945).

The District Court's reference to the Federal Rules of Civil Procedure does not, of course, relieve it from analysis and application of local law. *Ragan* v. *Merchants Transfer & Warehouse Co.*, 93 L. ed. Adv. Op. 1248 (1948).

II.

The action of the District Court is appealable and the Court of Appeals erred in dismissing the appeals under the final judgment rule.

The court below did not consider the merits of petitioner's argument to that court that the District Court com-

(8) "Appellants contend that defendant was precluded as a matter of law from moving for a judgment of non-suit because, in addition to a general denial, he set forth separate defenses in his answer, including a defense of contributory negligence; that in so doing he confessed his own negligence and could not argue that he was not the owner of the property. Since separate defenses in the answer are not treated as admissions of the parties, this contention cannot be sustained." 137 N. J. L. at 734.

mitted error in failing to inquire into and apply local law in the disposition of respondent's motion. Rather, the Court of Appeals dismissed the appeals before it under the final judgment rule,(9) saying (176 F. 2d 419, 420):

> "The orders appealed from are no more than orders made in the course of the litigations. There has been no final disposition on the merits insofar as the New York corporation is concerned. We are therefore without the power to determine the validity of the orders complained of."

Petitioner submits that the Court of Appeals was in error in applying the final judgment rule and that the action of the District Court was final and appealable within the meaning of the jurisdictional statute on two separate grounds, namely: (1) it finally disposed of substantial rights of petitioner, and (2) it determined a controversy distinct from the general subject matter of the litigation.(10)

(1) The action of the District Court finally disposed of substantial rights of petitioner.

It is settled that an appeal will be entertained from an order which deprives a party of a substantial right with

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(9) Title 28, United States Code, § 1291 (1948).

(10) Preliminarily, it is noted, first, that there is a general agreement among the critical comment relating to the rule of finality that the allowance of an appeal in a situation such as that presented here, where questions concerning the personal jurisdiction of the court have been determined, is highly desirable. See, e. g. Note (1947) 47 Col. L. Rev. 239, 252; and see, generally, Crick, *Final Judgment as a Basis for Appeal* (1932), 41 Yale L. J. 539. And, secondly, that the words "final decisions" have no fixed certain meaning, *U. S.* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2d, 1942), and are to be liberally and reasonably and not strictly and technically construed. *Rubert Hermanos, Inc.* v. *People of Puerto Rico*, 118 F. 2d 752, 757 (C. C. A. 1st, 1941). Recently this court observed that the statute has been long given a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp*, U. S. , 93 L. ed. Adv. Op. 1221, 1226 (1949).

such a measure of finality as to render postponed review inadequate or illusory. In the recent case of *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948), this court pointed out that an order that otherwise might be deemed interlocutory is appealable where "a controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailable" (p. 68), or where there is "any immediate threat of irreparable damages * * * rendering postponed review so illusory as to make the decree 'final' now or never" (p. 70). See also, *Gumbel* v. *Pitkin,* 113 U. S. 545 (1885); *Ex parte Tiffany,* 252 U. S. 32 (1920); *Cathay Trust, Ltd.* v. *Brooks,* 193 Fed. 973 (C. C. A. 9th, 1912); *Odell* v. *Batterman,* 223 Fed. 292 (C. C. A. 2d, 1915); *Bankers Trust Co.* v. *M. K. & T. Ry. Co.,* 251 Fed. 789 (C. C. A. 8th, 1918); *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.,* 282 Fed. 523 (C. C. A. 2d, 1922); *City & County of Denver* v. *Stenger,* 295 Fed. 809 (C. C. A. 8th, 1924).

Here, the effect of the action of the District Court has been to deprive petitioner of its right to enjoy the repose which had been conferred upon it by the local statute of limitations and to defend the actions by a plea of the statute.[11]

By ignoring state law and permitting respondent's amendments to relate back to the commencement of the actions, the District Court was able to find that petitioner had been served with process within time and had appeared in the actions prior to the expiration of the statutory limi-

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(11) In *Sayres* v. *Scudder,* 2 N. J. L. 53 (1806), where a plea of the statute was overruled at nisi prius, the highest court of the state reversed on the ground that such action resulted in "depriving the defendant of a right he had acquired under the statute law of the State."

tation. By the law of the case, petitioner cannot now plead the statute in bar and has no alternative, short of suffering a default, but to submit to jurisdiction, appear generally in the actions, and defend on the merits.

Although the Court of Appeals in its opinion stated, "If the New York corporation is wrongly held in the suits, that legal fact can be determined by appeals after trials on the merits in the court below," 176 F. 2d at 420, whether the questions presented are reserved for future review remains conjectural. The statement of the Court of Appeals would admit of no doubt if the action of the District Court had consisted simply of a legal determination overruling a defense of the statute in the ordinary course of a proceeding. But, here, the court found as a fact that petitioner had appeared in the actions as a defendant prior to the bar of the statute. A clean-cut ruling on the applicability of the statute has been thwarted by resort to a procedural and fact finding device which makes postponed review doubtful. Further, if future review is available, it is clearly inadequate and incapable of restoring petitioner's right to repose. It cannot, for example, restore the time and cost involved in a trial and in the preparation for a trial over seven years after the occurrence of the alleged tort.

(2) The action of the District Court determined a controversy distinct from the general subject matter of the litigation.

It is settled, also, that an order entered in the course of a proceeding which finally determines a controversy distinct from the general subject of the litigation is appealable. *Cohen* v. *Beneficial Industrial Loan Corp.*, U. S. , 93 L. ed. Adv. Op. 1221 (1949); *United States* v. *River*

Rouge Improvement Co., 269 U. S. 411 (1926); *Trustees* v. *Greenough*, 105 U. S. 527 (1881). See also, *Rubert Hermanos* v. *People of Puerto Rico*, 118 F. 2d 752 (C. C. A. 1st, 1941); *Kasishke* v. *Baker*, 114 F. 2d 384 (C. C. A. 10th, 1944).

The action of the District Court falls within this rule for two reasons: (a) because, in effect, it finally determines, with prejudice to petitioner's rights, that the *Erie* doctrine is inapplicable, and (b) because it finally disposes of the proceeding instituted by petitioner to set aside the court's previous ruling on the ground that personal jurisdiction was lacking.

(a) It does not appear that this court has ever decided the question of the appealability before final judgment of an order which determines, or has the effect of determining, the inapplicability of the *Erie* doctrine. But the propriety of permitting an appeal prior to an adjudication on the merits where, as here, an application of the *Erie* doctrine will terminate the litigation is a logical integration of the principle of *Guaranty Trust Co.* v. *York* and the rule affirmed in *Cohen* v. *Beneficial Industrial Loan Corp.* A determination of whether or not *Erie* applies involves an analysis of whether or not substantial rights are affected. In a case, such as this, when local law is applicable and the court erroneously disregards that law, such action constitutes the decision of an issue which is independent of and collateral to the merits of the litigation, in a manner prejudicial to substantive rights.

(b) Petitioner's motion in the District Court sought to have that court set aside its previous findings of fact

and conclusions favoring respondent's motion to amend. In support, petitioner urged a lack of personal jurisdiction in the insufficiency of personal process. That proceeding, it is submitted, presented a controversy distinct from the general subject of the litigation, and the subsequent order was a final decision in that proceeding from which a direct appeal may be taken.

In point are cases involving orders denying motions to vacate default judgments on jurisdictional grounds. As a general rule, an order refusing to vacate a default judgment is non-appealable. See, e. g., *Glinski* v. *United States,* 93 F. 2d 418 (C. C. A. 7th, 1937), and cases therein cited. But where the order is sought upon the ground that the default was entered without personal jurisdiction or by reason of fraud, refusal of the order is appealable on the basis of a separate proceeding being involved. *Taylor* v. *United States,* 145 F. 2d 641 (C. C. A. 10th, 1944); *State Tax Commission* v. *United States,* 136 F. 2d 903 (C. C. A. 10th, 1943); *Jackson* v. *Heiser,* 111 F. 2d 310 (C. C. A. 9th, 1940); *Glinski* v. *United States,* 93 F. 2d 418 (C. C. A. 7th, 1937); *Hopkins* v. *McClure,* 148 F. 2d 67 (C. C. A. 10th, 1945). The leading case is *Stevirmac Oil & Gas Co.* v. *Dittman,* 245 U. S. 210 (1917). In that case, an action was commenced against the Stevirmac Oil & Gas Company and one Virgil Hicks to reciver a money judgment. The marshal's return of process showed service upon "Virgil Hicks, Treasurer" and that the company had not been served. The court ordered the return amended to show service upon the company and thereafter rendered a default judgment. Subsequently, the company moved to set the judgment aside on the ground that the court lacked

personal jurisdiction. The court denied the application and an appeal was taken. The Supreme Court held the action of the trial court to be appealable, saying:

> "The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that no jurisdiction was acquired over the Stevirmac Oil & Gas Company by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside that judgment, indeed, it did entertain jurisdiction and decided against the contention of the plaintiff in error. *In such case we have no doubt that, in view of the nature of the attack made upon the original judgment, the judgment in the present proceeding was final, and reviewable in the court of appeals.*" (Italics supplied.)

The fundamental bases of the proceeding in *Stevirmac* and of petitioner's motion in the District Court are identical. In both instances, there is an attempt to set aside judicial action by an attack upon a jurisdiction purported to be acquired by an amendment. The only perceptible distinction is found in the presence in the one case of a default judgment. To hold that such a distinction has legal effect leading to a contrary result will penalize diligent action. Here, petitioner might have awaited a default judgment to attack the jurisdiction of the court. If the attack proved unsuccessful, an appeal would lie under the above line of authority. To hold the present orders non-appealable will

work at cross-purposes with the general policy favoring the expeditious settlement of legal controversies.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Court of Appeals dismissing the appeals taken to that court from the orders of the District Court under the final judgment rule should be granted.

CHARLES DANZIG,
Counsel for Petitioner.

No. 423

NOV 30 1949

CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1949.

INTERSTATE EQUIPMENT CORPORATION,
Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY,
to the use of Esther F. Silva, and Earl C. Silva, a minor,
Respondent.

INTERSTATE EQUIPMENT CORPORATION,
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vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY,
to the use of George W. Johnson,
Respondent.

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HARTFORD ACCIDENT & INDEMNITY COMPANY,
to the use of Henry K. Plemer,
Respondent.

INTERSTATE EQUIPMENT CORPORATION,
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HARTFORD ACCIDENT & INDEMNITY COMPANY,
to the use of Hiram John,
Respondent.

On Petition for Writ of Certiorari

RESPONDENT'S BRIEF.

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INDEX.

	PAGE
ARGUMENT	1
THE PROCEEDINGS ARE PREMATURE	1
CONCLUSION	4

TABLE OF CITATIONS.

Cases:

Roche v. *Evaporated Milk Association*, 319 U. S. 21 (1943)	2

STATUTES.

Sec. 1291, Title 28, U. S. C.	1
Sec. 1292, Title 28, U. S. C.	2

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On Petition for Writ of Certiorari

RESPONDENT'S BRIEF.

ARGUMENT.

The Proceedings are Premature.

The orders of the District Court sought to be reviewed are not final decisions which may be reviewed pursuant to the authority of sec. 1291 of Title 28, U. S. C., nor are

they of any of the classes of interlocutory orders appealable under sec. 1292 of that Title. The effect of these orders is to leave the actions still pending and undetermined with leave granted the present petitioner to file amended answers. Nor can mandamus or prohibition be availed of to effect a review. In *Roche* v. *Evaporated Milk Association,* 319 U. S. 21 (1943), Chief Justice Stone said (at pp. 27-31):

> "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record. Ex parte Morgan, 114 U. S. 174, 175, 29 L. ed. 135, 136, 5 S. Ct. 825; Re Atlantic City R. Co., 164 U. S. 633, 635, 41 L. ed. 579, 580, 17 S. Ct. 208; Ex parte Roe, 234 U. S. 70, 73, 58 L. ed. 1217, 1218, 34 S. Ct. 722; Ex parte Park Square Auto. Station, 244 U. S. 412, 414, 61 L. ed. 1231, 1232, 37 S. Ct. 732; Ex parte Riddle, 255 U. S. 450, 451, 65 L. ed. 725, 726, 41 S. Ct. 370. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U. S. C. A., § 225 (a), 7 F. C. A. title 28, § 225 (a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgment should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. Cobbledick *v.* United

States, 309 U. S. 323, 84 L. ed. 783, 60 S. Ct. 540. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment.' Bank of Columbia *v.* Sweeney, 1 Pet. (U. S.) 567, 569, 7 L. ed. 265, 266. See also Life & F. Ins. Co. *v.* Adams, 9 Pet. (U. S.) 573, 602, 9 L. ed. 234, 244; Ex parte Hoard, 105 U. S. 578, 579, 580, 26 L. ed. 1176, 1177; American Constr. Co. *v.* Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 S. Ct. 758.

For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252; Ex parte Roe, 234 U. S. 70, 58 L. ed. 1217, 34 S. Ct. 722, and Ex parte Park Square Auto. Station, 244 U. S. 412, 61 L. ed. 1231, 37 S. Ct. 732, supra. And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, Re Atlantic City R. Co., 164 U. S. 633, 41 L. ed. 579, 17 S. Ct. 208, supra; Re Chicago, R. I. & P. R. Co., 255 U. S. 273, 280, 65 L. ed. 631, 635, 41 S. Ct. 288; cf. Re New York & P. R. S. S. Co., 155 U. S. 523, 531, 39 L. ed. 246, 249, 15 S. Ct. 183, or denying a non-suit, Ex parte Loring, 94 U. S. 418, 24 L. ed. 165, despite the inconvenience to petitioner of being forced to proceed to trial in advance of a review of the court's action. Ex parte Whitney, 13 Pet. (U. S.) 404, 408, 10 L. ed. 221, 223; Ex parte Perry, 102 U. S. 183, 186, 26 L. ed. 43, 44. Here the inconvenience to the

> litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct."

In being required to go to trial and to await a final decision, this petitioner will be put to an inconvenience which certainly is not so great as that of the respondent in the case just cited.

The Court of Appeals quite properly dismissed the appeals before it and denied petitioner's application for mandamus or prohibition.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, should be denied.

Respectfully submitted,

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